

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2070, 2100

To be argued by
FRANK H. SANTORO

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-2070

RODERICK S. DUBOIS,

Appellant,

—v.—

GEORGE C. WILKINSON, Warden, Federal Correctional
Institution, Danbury, Connecticut,

Appellee.

Docket No. 77-2100

ALAN GENE KINCADE and MELVIN E. HENTOFF,
Appellants,

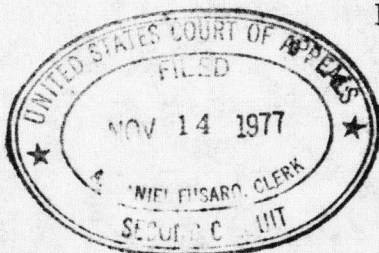
—v.—

GEORGE C. WILKINSON, Warden, Federal Correctional
Institution, Danbury, Connecticut,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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BRIEF FOR THE APPELLEE

Statement of the Case

With the exception of certain conclusory and argumentative language contained therein, the Government does not take issue with the procedural and factual history of the case as stated in the Appellants' "Preliminary

Statement" and "Statement of Facts". Messrs DuBois and Kincade—both serving indeterminate sentences—were recently denied parole in a process which involved the use of the Parole Commission Guidelines. The issue in this case is purely legal.

Statement of the Issue

The issue in this case is whether the Parole Commission Guidelines are inherently inconsistent with the indeterminate sentence provision contained in 18 U.S.C. § 4205 (b) (2).

ARGUMENT

Summary

The Government submits that the Parole Commission Guidelines are an intelligent and flexible structure for parole decisionmaking in no way inconsistent with the provision of 4205 (b) (2). Challenges similar to that of the Appellants have been overwhelmingly rejected by the Courts. The relevant legislative history, moreover, is equally unsupportive of their position. The guidelines do not present an inherent frustration of judicial sentencing expectations and the parole process as a whole does not ignore the factor of rehabilitation.

I. Appellants' Contention Has Been Rejected in the Courts.

This contention has been overwhelmingly rejected in a line of cases have squarely faced the issue.

In the District of Connecticut the Judges have been virtually unanimous. The opinions of Judges Newman and Zampano, of course, are the subjects of appeal in this

case. Judge Newman's opinion is reflected in another similar case in which he stated:

"Section 4208(a)(2) is an early parole consideration provision. It does not prevent the Commission from applying the sentence guidelines in the same manner as they would be applied for a prisoner serving a conventional sentence."

Charles Robert Thomas III v. Wilkinson, Civil No. B-77-131 (D. Conn., June 1, 1977).

Judges Blumenfeld and Clarie have similarly approved the guidelines in such cases in *Pisarski v. United States of America*, Civil No. H-76-340 (D. Conn., Dec. 13, 1976) and *Rothwell v. United States of America*, Civil No. H-76-295 (D. Conn., Oct. 1, 1976).¹

Courts in other places have reached the same result. Thus, in *Stroud v. Weger*, 380 F. Supp. 897, 899 (M.D. Pa. 1974), the Court stated:

"Section 4208(a)(2) does not annul or modify the statutory requirements with respect to suitability for parole release embodied in 18 U.S.C.A. § 4203 and the Board's paroling guidelines promulgated thereunder. 39 Fed. Reg. § 2.20 (1974). Thus, a prisoner sentenced under Section 4208(a)(2) is subject to the same substantive parole release standards as all other inmates."

In *Kramer v. United States*, 409 F. Supp. 1402, 1404 (N.D. Ga. 1976), the Court said:

"Petitioner is not entitled to early release simply because he is an 'A-2' prisoner whose institutional performance has been good . . . early release for the 'A-2' prisoner is no less dependent on 'excep-

¹ These latter three cases are unreported. Copies of the memorandum decisions are appended hereto as Exhibits 1, 2, and 3 respectively.

tionally good institutional program achievement' than it is for prisoners serving 'straight' sentences."

In rejecting the contention in *Benson and Flowers v. U.S. Board of Parole*, No. 75-C-475 (W.D. Wisc., Sept. 21, 1976),² pp. 9-10, the Court discusses why institutional adjustment is deemphasized in the guidelines *per se* because of the difficulty of scientific measurement. And in coming to the same conclusion in *Geraghty v. United States Parole Commission*, 429 F. Supp. 737, 742, 743 (M.D. Pa. 1977), *appeal pending*, the Court said:

Although institutional performance is now a parole release criterion rather than a condition of eligibility, the difference in characterization is not substantive. . . .

A third contention of petitioner's is that the guidelines are unlawful because they repeal by administrative fiat the provisions of 18 U.S.C. § 4208(a)(2) (1958) . . . What petitioner is really claiming is that the Commission's guidelines should not be applied to a prisoner such as himself who was sentenced under 18 U.S.C. § 4208(a)(2) (1958). Petitioner's contention has been previously rejected in this district. . . .

See also: McArthur v. United States Board of Parole, 434 F. Supp. 163 (S.D. Ind., 1976); *deVyver v. Warden, U.S. Penitentiary*, 388 F. Supp. 1213 (M.D. Pa. 1974); and *Garcia v. United States Board of Parole*, 557 F.2d 100 (7th Cir. 1977).

Appellants reach for a measure of support in the cases of *Grasso v. Norton*, 520 F.2d 27 (2d Cir. 1975) and *Garafola v. Benson*, 505 F.2d 1212 (7th Cir. 1974). These cases are inapposite, however. They deal with the

² Another unreported case, a copy of which is attached hereto as Exhibit 4.

right to a one-third point hearing in 4205(b)(2) cases and are concerned primarily with mechanical questions of the number and type of reviews rather than the actual criteria which should be utilized in the release decision process.

In general, the Parole Guidelines have received an almost universal measure of acceptance, *Wiley v. Board of Parole*, 380 F. Supp. 1194 (M.D. Pa. 1974); *Battle v. Norton*, 365 F. Supp. 925 (D. Conn. 1973); *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale Law Journal 810, 872 (1975) and the appellants' frontal attack is inconsistent with that measure of acceptance developed through time, experimentation, and the best available tools of social science.

II. Appellants' Contention is Not Supported by Relevant Legislative History.

In support of their contention, appellants cite portions of legislative history which indicate that rehabilitation was one of the major considerations in the enactment of the indeterminate sentence. This 1958 history, however, has limited relevance to the problem presented by the instant case. The best legislative comment on the recently evolved guidelines may be seen in the legislative history of the 1976 Parole Commission and Reorganization Act, 18 U.S.C. § 4201 *et seq.* This is generally contained in 1976 *U.S. Code Congressional and Administrative News*, Vol. 2, p. 335 *et seq.* Although it refers to b-2 sentences, it conspicuously fails to adopt appellants' position. Rather, it is supportive of the guidelines for all sentencing options. Thus:

The standards for release on parole and for revocation of parole are not significantly changed from existing law. The only notable change is that the standards and criteria are made the same for all federal prisoners without regard to which

of the three main sentencing alternatives is utilized by the Court. This will be of significant benefit to the federal correctional institutions because offenders sentenced for similar crimes under similar circumstances will be required to serve comparable periods of incarceration.

(Senate Report No. 94-369 at pp. 339-340, U.S. Code, Cong. & Admin. News, *supra*.)

and,

The organization of parole decision-making along regional lines, the use of hearing examiners to prepare recommendations for action, and, most importantly, the promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute, removes doubt as to the legality of changes implemented by administrative reorganization and makes the improvements permanent.

(House Conference Report No. 94-838 at p. 353, *Id.*)

This philosophy is further reinforced in an even more recent Senate Oversight Committee report on the Act:

"The rule of Parole in criminal justice has changed markedly since its inception. It originated as a means for mitigating particularly harsh criminal penalties. Parole reached its zenith two decades ago, as part of a system of indeterminate sentences based upon the hope that criminal offenders could be rehabilitated and returned to society as useful citizens."

"The ultimate ideology behind the unrestricted use of the indeterminate sentence was that criminal behavior was susceptible to diagnosis and treatment; that the field of corrections had the tech-

niques and resources necessary to bring about this rehabilitation. It was also part of the belief that parole agencies could judge when the treatment had been effective."

"The rehabilitation ideology has been useful to the field of corrections, because it has been used to support commitment of funds to such things as education, vocational training and industrial work for convicted offenders. However, it is not possible to 'guarantee' rehabilitation as the end product of something such as a class or a counseling session, and the result has been a raising of public hopes that cannot be fulfilled with present resources."

"One role which parole has consistently served throughout its history is that of rewarding inmates for good behavior while in prison, and this was preserved in the new parole legislation. There are no scientific findings, but the professionals in the correctional field have long argued that the promise and threat of parole decisions contributes to the ability to manage inmates in penal institutions."

"The criteria and guidelines required by the new legislation return parole to something much closer to its historic purposes—that of making terms of imprisonment fit public perception of the seriousness of the offense and the aggravating and mitigating circumstances under which it was committed. . . ."

Report No. 95-86 of the Committee on the Judiciary, U.S. Senate, 95th Congress, First Session.³

In summary, therefore, the legislative history militates against rather than in favor of the appellants' claim.

³ A copy of this 1977 report is attached hereto as Exhibit 5.

III. There is no Inherent Frustration of Judicial Sentencing Expectations in b-2 cases by the Use of the Guidelines.

Appellants' argument implies that a Judge who selects the b-2 sentencing alternative necessarily and exclusively has mandated that rehabilitation be given paramount importance—a mandate intrinsically violated by the guidelines. This argument has found little support in the opinions of those trial judges who have had occasion to pass on the subject. Virtually all of the previously cited cases rejecting appellants' contention were by trial judges highly sophisticated in the relationship between the sentencing process, the guideline matrix, and the actual parole release decision process. Although a Judge might very well select a b-2 sentence for rehabilitative purposes, *United States v. Zacharias*, 365 F. Supp. 256 (S.D.N.Y. 1973), there are other possible reasons. The sentencing decision is one of mixed factors, *United States v. Jenkins*, 403 F. Supp. 407 (D. Conn., 1975), and among them could be the need for flexibility in the event of totally unforeseen circumstances, *Battle v. Norton, supra*, at 932. See also Comments by former Board Chairman Chappell on the purposes of such terms at 37 F.R.D. 111, 209 (1965). It is totally against accepted notions of the sentencing process that the same is a mandatory directive to the Parole Commission. Each has its own separate role. There is no claim of a specific frustration of the sentencing Judge's intent in this case and, in any event, the same would not be ideally cured by appellants' solution. In short, the guidelines do not represent an inherent contradiction to the sentencing process.

IV. The Parole Process Does Not Ignore Rehabilitation.

By citing certain statistics on guidelines usage, appellants argue that the Parole Commission gives little or no consideration to factors of rehabilitation and institutional adjustment. To a degree, this argument is self defeating. It assumes that in those cases decided outside the guidelines, the Commission does indeed consider those factors and the appellants are reduced to the substantially less persuasive argument that such factors are simply "not given weight".⁴ In any event, the figures are not particularly unreasonable given that good institutional adjustment is a prerequisite for guideline usage release, 28 C.F.R. § 2.20(b), and that most inmates would naturally be expected to fall somewhere on the spectrum between the two extremes.

Rehabilitation is not ignored in the process, however. It is merely considered in a way other than as a factor on the two dimensional guideline matrix. Once an inmate's eligibility is determined, his institutional adjustment is a significant factor in determining whether he will be released above or below his guideline range. 28 C.F.R. § 2.20(c). To complete the analogy, it is a third dimensional factor. 18 U.S.C. § 4206(a) provides that an "eligible" prisoner shall be released if he substantially observes the rules of the institution. Presumptive eligibility is distinct from actual suitability for release, a distinction recognized by *Stroud v. Weger, supra*, at p. 899 and Judge Newman when he said in *Dubois*:

"... the fact that a prisoner is eligible for parole does not mean that he is entitled to parole."

⁴ Appellants' brief, p. 17. Mr. Kincade is not a particularly good example for their purposes. A decision *above* the guidelines was found warranted in his case (Appellants' brief, p. 9).

In summary, therefore, it is clear that the Parole process as a whole (which includes but is not limited to the guideline calculation) gives ample attention to the factors of rehabilitation and institutional adjustment.

CONCLUSION

For the same reasons that appellants' construction of the law has not found support in numerous judicial decisions, legislative history, and the practicalities of the sentencing and parole decision-making processes, it is respectfully submitted that it should be rejected in this case.

Respectfully submitted,

RICHARD BLUMENTHAL

United States Attorney

By: FRANK H. SANTORO

Assistant United States Attorney

ADDENDUM

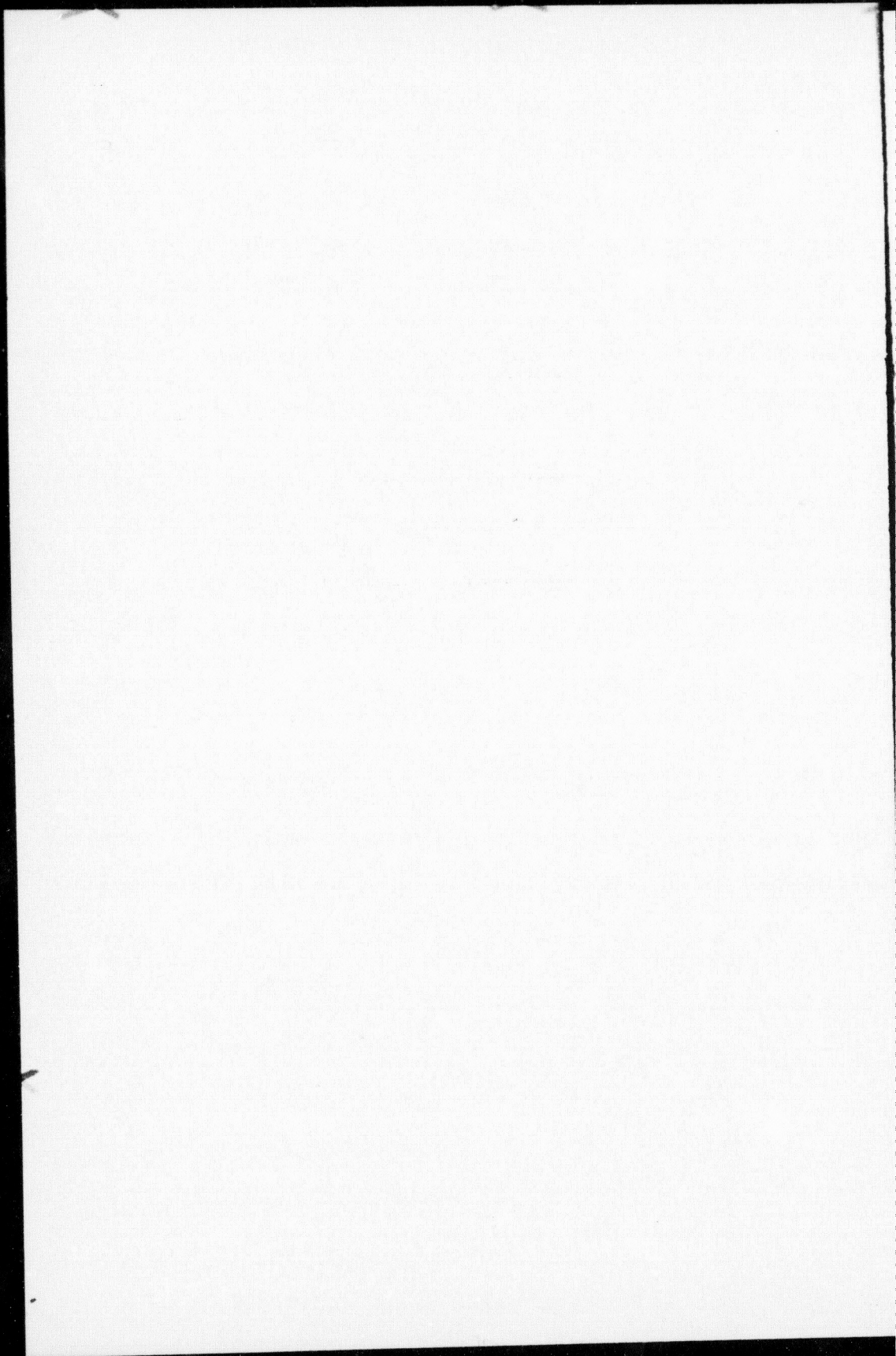


EXHIBIT 1

Memorandum of Decision

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-77-131

CHARLES ROBERT THOMAS, III

v.

GEORGE C. WILKINSON, WARDEN, FEDERAL CORRECTIONAL
INSTITUTION, DANBURY, CONNECTICUT, ET AL.

Petitioner, an inmate at Federal Correctional Institution, Danbury, complains of the denial of parole. He has exhausted administrative remedies.

Petitioner is presently serving six concurrent three-year sentences for violations of 18 U.S.C. §§ 2312, 2313, arising out of petitioner's participation in a stolen car ring in 1970-73. Petitioner was sentenced under 18 U.S.C. § 4208(a)(2), which has been recodified by the Parole Commission and Reorganization Act as § 4205(b)(2).

Petitioner was considered for parole six months after the commencement of his federal sentence. The Commission denied parole, indicating as the basis for its decision the wide disparity between the relatively brief period of petitioner's custody and the 20-26 months time range specified in the Commission guidelines for petitioner's offense and salient factor score.

EXHIBIT 1—Memorandum of Decision

Petitioner contends that he was denied due process by the Parole Commission in that (1) it relied on the Commission's sentence guidelines in denying parole, and (2) it failed to base its decision on a reason that was sufficiently specific to allow judicial review of the parole denial.

Petitioner's claims provide no basis for judicial intervention in the parole process. While a parole agency's decisions are not always immunized from judicial review, courts must acknowledge the broad discretion normally accorded the Commission in granting or denying parole. *Scarpa v. U.S. Board of Parole*, 477 F.2d 278 (5th Cir. 1973).

Petitioner's claim that the reason provided by the Commission is inadequate to permit judicial review of the parole denial is without merit. The reason why petitioner was denied parole is sufficiently clear to this Court from a review of the facts submitted with the complaint and the reason stated by the Commission.

Essentially, petitioner contends that he should be entitled to earlier release because he was sentenced under 18 U.S.C. § 4208(a)(2), and he has a record of excellent institutional progress.

Section 4208(a)(2) provides that an inmate is eligible for parole "at such time as the board of parole may determine," rather than at the one-third point of his sentence. Although petitioner was entitled, under this statute, to earlier parole consideration than he otherwise would have had, the statute does not alter the Commission's authority to decline parole release for an inmate who has been in custody far short of the pertinent guideline time range.

EXHIBIT 1—Memorandum of Decision

As the court noted in *Kramer v. United States*, 409 F. Supp. 1402, 1404 (N.D. Ga. 1976):

Prisoner is not entitled to early release simply because he is an "A-2" prisoner whose institutional performance has been good . . . Early release for the "A-2" prisoner is no less dependent on "exceptionally good institutional program achievement" than it is for prisoners serving "straight" sentences.

Section 4208(a)(2) is an early parole consideration provision. It does not prevent the Commission from applying the sentence guidelines in the same manner as they would be applied for a prisoner serving a conventional sentence. *Kramer v. United States, supra*; *Flannery v. United States*, Civil No. H-76-415 (D. Conn. 1976).

The petition is dismissed.

Dated at New Haven, Connecticut, this 1 day of June, 1977.

JON O. NEWMAN
JON O. NEWMAN
United States District Judge

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Civil No. H-76-340

ALFRED PISARSKI

—v.—

UNITED STATES OF AMERICA

Memorandum of Decision

This is another case of a convicted defendant who moves to have the sentence imposed upon him vacated or corrected. His contention is that because the two-year sentence finally imposed upon him was under 18 U.S.C. § 4208(a) (now § 4205(b)(2)), the decision of the Parole Board to continue him in custody until the expiration of his term is antithetical to § 4204(b)(2), and so frustrated the sentencing court's intention as to require resentencing.

Facts

A full review of the history of this case is not necessary. After pleading not guilty to four counts of violation of 18 U.S.C. § 1708 and 18 U.S.C. § 495, Pisarski's motion for release on his own recognizance was granted. Some three months later his attorney requested that the court set a bond for Pisarski's appearance. The basis for this request was that Pisarski was emotionally unstable and had used alcohol and cocaine since his release. Again, his attorney requested that Pisarski should be

EXHIBIT 2—Memorandum of Decision

released on his own recognizance with the restriction that he live at the Salvation Army and participate in its Men's Social Service Center for treatment of alcoholism. This request was granted.

After Pisarski changed his plea to guilty to count one and while a pre-sentence investigation was underway, he left the Salvation Army program against the advice of the staff. He turned himself in to the probation office.

Pisarski was sentenced to a period of study and observation pursuant to 18 U.S.C. § 4208(b). After receiving reports and the recommendations called for under that procedure, Pisarski was resentenced. Two paragraphs in the report and recommendation from the Regional Director are pertinent:

"Currently, Mr. Pisarski enjoys normal physical and mental health, however, he has abused both drugs and alcohol. Mr. Pisarski has participated in several community based drug and alcohol therapeutic programs, but with little success.

"While the instant offense is not a serious one, Mr. Pisarski's criminal activity is repetitive and extensive. Therefore, we recommend that Mr. Pisarski be sentenced to a three year term under Title 18, U.S.C., Section 4208(a)(2). This incarceration would allow Mr. Pisarski to avail himself of remedial education, vocational training, and structured counseling programs."

Instead of adopting the recommendation in its entirety, the court imposed sentence for only two years, but still under former § 4208(a)(2), stating:

"So that if they find that he's really able to hold down a job and does it well, they will be able to

EXHIBIT 2—Memorandum of Decision

release him sooner if they wish." Sentencing Tr. 10-11 (Jan. 19, 1976).

The institutional progress report of April 14, 1976, noted that Pisarski had not participated in any vocational training or counseling program, nor any community based programs for no "particular reason." The fact that in other respects Pisarski had been a model prisoner does not vitiate the action of the Parole Board. *Kramer v. United States*, 409 F. Supp. 1402 (N.D. Ga. 1976); cf. *Fitzmaurice v. United States*, Civil No. H-76-189 (D. Conn. Sept. 14, 1976). The determination of the Parole Board that a decision outside the Board's guidelines was not warranted furnishes no basis for the relief requested.¹ *D'Allesandro v. United States*, 517 F.2d 429 (2d Cir. 1974). Even if I were disposed to substitute my own discretion for that of the Board, which I am not, *Billian v. U. S. Board of Parole*, Docket No. 75-6120 (2d Cir. Aug. 30, 1976), I am without power to do so.

Moreover, nothing in the Parole Board's decision to continue Pisarski in custody until expiration runs contrary to my intention when I sentenced him.

The petition is dismissed.

SO ORDERED.

Dated at Hartford, Connecticut, this 13th day of December, 1976.

M. JOSEPH BLUMENFELD
United States District Judge

¹ The guidelines may be found in 28 C.F.R. § 2.20, 39 Fed. Reg. 20028 (1974).

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-76-295

JOHN ROTHWELL

—vs.—

UNITED STATES OF AMERICA

**Ruling on Petitioner's Motion to
Correct Sentence**

The petitioner, a federal prisoner, was found guilty after a jury trial in this Court, on Counts 9 and 10 for the possession and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) and on Count 11 for conspiracy to possess and distribute said drug under 21 U.S.C. § 846. He was sentenced in this Court on April 3, 1973, to serve four years on each of the three counts, said counts to be served concurrently, pursuant to 18 U.S.C. § 4208(a)(2). He appealed his conviction ultimately to the United States Supreme Court, where it was affirmed and the Court's mandate, dated February 19, 1974, was filed with the Clerk of this Court on April 5, 1974. Through a clerical oversight, however, the Clerk failed to notify the United States Marshal's Office, and he did not actually enter federal custody until August 28, 1975, more than a year after the Supreme Court denied his appeal. The respondent has moved to dismiss the petition for lack of jurisdiction.

The petitioner now represents that subsequent to his sentencing, the Parole Board adopted a new guideline

*EXHIBIT 3—Ruling on Petitioner's Motion to
Correct Sentence*

policy, which changed the criteria, upon which parole was to be considered. He states that the sentencing judge could not have had any knowledge of these guidelines, because they were not in use at the time of his sentencing. He also complains that other defendants involved in his crime are not now incarcerated. However, it must be borne in mind that defendant Catalano received a three-year sentence, which was served; and the other two defendants, Holmes and Fox, were sentenced to two years, suspended after four months. The petitioner was proven to be the supplier and source of cocaine for the others and traded in substantially large quantities. The two-year delay in processing his appeal and the late commencement of his sentence were other factors which explain the reason for his continued incarceration.

On February 9, 1976, petitioner was given a parole hearing before the Hearing Examiner Panel at Allenwood, Pennsylvania, and that hearing was continued to a time equal to one-third of his sentence. Thereafter, on July 29, 1976, the present action was filed in Court.

When this Court imposed the § 4208(a)(2) sentence, it intended to give to the Parole Board (now the Parole Commission) complete discretion under the law to decide, when the petitioner should be released. The Court contemplated no second guesses on the exercise of this delegated discretion. As the Second Circuit Court of Appeals recently spelled out:

"The district court has no power to substitute its own discretion for that of the Board. If the court has found that the Board has abused its discretion, it may remand the case to the board with instructions for correction." *Billieri v. United States Board of Parole*, Civ. Docket No. 75-6120 (2d Cir. Aug. 30, 1976), Slip Op. at 5297.

*EXHIBIT 3—Ruling on Petitioner's Motion to
Correct Sentence*

The foregoing principle is further substantiated in *Tarlton v. Clark*, 441 F.2d 384, 385 (5th Cir. 1971):

"By the language of Title 18 U.S.C.A. § 4203, the Board of Parole is given absolute discretion in matters of parole. The courts are without power to grant a parole or to determine judicially eligibility for parole. *United States v. Frederick*, 405 F.2d 129 (3rd Cir. 1968). Furthermore, it is not the function of the court to review the discretion of the Board in the denial of application for parole or to review the credibility of reports and information received by the Board in making its determination."

Also see *Thompkins v. United States Board of Parole*, 427 F.2d 222 (5th Cir. 1970); *Kramer v. United States*, 407 F. Supp. 1402 (N.D. Ga. 1976).

Nothing in the Parole Board's action in exercising its discretion runs contrary to this Court's original intention. It is not the Court's prerogative to second-guess the Parole Board. They decided that a decision outside the parole guidelines was not warranted, a discretion which the Court intentionally vested in them at time of sentencing. It is not unusual for the Court to impose sentences in similar criminal activity to six, seven or eight years, depending upon the circumstances and overall record. In light of this petitioner's military record, the Court granted him every reasonable consideration. The Parole Board's action has not denied him meaningful consideration.

Under Rule 35, Fed. R. Crim. P., entitled "Correction or Reduction of Sentence," the Court is authorized to

*EXHIBIT 3—Ruling on Petitioner's Motion to
Correct Sentence*

“reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review. . . .”

Jurisdiction under this Rule has passed and the Court is without authority to act. Furthermore, if the Court had such jurisdiction and authority, it would deny the petition on the present record and papers. The Court finds that Rothwell has been treated fairly and justly, both by the Court and the Parole Board.

There has been no sentencing error here. The petition is accordingly denied and dismissed. So ORDERED.

Dated at Hartford, Connecticut, this 1st day of October, 1976

T. EMMET CLARIE
Chief Judge

11a

EXHIBIT 4—Order

EXHIBIT 4

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
75-C-475

JOHN LEONARD BENSON, and RICHARD FRANCIS FLOWERS,
Petitioners,

—v.—

UNITED STATES BOARD OF PAROLE,
Respondent.

Order

This is a petition for writ of habeas corpus properly before this court by virtue of 28 U.S.C. §§ 2241(a), (c) (1), (c) (3) (1970). Petitioners challenge the denial of their applications for parole. I now "dispose of the matter as law and justice require." 28 U.S.C. § 2243 (1970).

Facts

On the basis of the petition, response, and traverse, I find the following facts. Petitioners are inmates at the Federal Correctional Institution, Oxford, Wisconsin, serving sentences imposed upon them under the provisions of 18 U.S.C. § 4208(a) (2) (1970). Petitioner Flowers was sentenced to a term of five years for conspiracy (the record does not reveal the nature of the substantive offense which petitioner Flowers conspired to commit),

EXHIBIT 4—Order

while petitioner Benson was sentenced to a term of 12 years for bank robbery.

Petitioners appeared before an examiner panel of the United States Board of Parole in July of 1975. Each was denied parole and continued until July of 1977. Petitioner Flowers was informed that he had been denied parole because:

"Your offense behavior has been rated as very high severity. You have a salient factor score of 10 (see attached sheet). You have been in custody a total of 5 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant facts and information presented, it is found that a decision outside the guidelines at this consideration does not appear warranted."

The explanation given petitioner Benson for the denial of parole was identical on a word-for-word basis to the one given petitioner Flowers, with the exception that it noted that he had been in custody for 7 months.

The guidelines referred to in the statements of reasons for the denial of parole are contained in 28 C.F.R. § 2.20 (1975). The guidelines consist of a matrix listing six categories of "severity of offense behavior" ranging from "low" to "greatest" on the vertical axis and four categories of "offender characteristics: parole prognosis (salient factor score)," ranging from "very good" to "poor" on the horizontal axis. At each intersection, a range of months appears.

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"Very high" is the fifth severity rating on an ascending scale. A salient factor score of ten places the offender in the "very good" parole prognosis category. Twenty-six to thirty-six months appears at the intersection of "very high" offense severity and "very good" parole prognosis.

Under each offense severity heading, a group of crimes appears. Under the "very high" offense severity heading, for example, are listed: robbery (weapon or threat), sale or possession with intent to distribute of hard drugs with no prior convictions of sale of hard drugs, sale or possession with intent to distribute of a large quantity of soft drugs, extortion, Mann Act (force), and sexual act (force). The crime of conspiracy is not listed under any offense severity heading. Note 2 to the guidelines states "if an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed."

Offenses were placed in the different severity categories on the basis of "a statistical analysis of the length of time served by past prisoners with good institutional records." Response at p. 4. Apparently, this statistical analysis was not the exclusive basis for ranking offenses. The preamble to the most recent promulgation of the guidelines, 40 Fed. Reg. 41328, 41329 (Sept. 5, 1975), explains certain changes in offense severity ratings on the basis of the Board of Parole's attitude toward those offenses. The record suggests that the severity ratings are an amalgam of the statistical analysis and the Board's independent analysis of the severity of different offenses. The record does not disclose the extent to which the Board considered the maximum penalty provided by Congress for an offense in rating its severity. An examination of the "very high" severity category, however, suggests that

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the maximum penalty was not a determinative consideration. In that category are offenses carrying a statutory maximum penalty of from five years imprisonment (Mann Act (force), 18 U.S.C. §§ 2241, 2242 (1970)) to twenty years imprisonment (Robbery (weapon or threat), 18 U.S.C. § 2113(a) (1970)).

Severity of offense behavior and parole prognosis are the only variables used under the guidelines to determine the "customary range of time to be served before release." 28 C.F.R. § 2.20(b) (1975). Petitioners draw particular attention to two factors not incorporated into the guidelines: the sentence actually meted out to the offender and his rehabilitative progress while in prison. The preamble to the most recent publication of the guidelines explains both omissions. The sentence actually given the offender was not included as a variable because to include it "would defeat one of the primary benefits of the Board's guidelines, which is to reduce sentence disparity, an important goal endorsed in comments received by the Board." 40 Fed. Reg. 41328, 41330 (Sept. 5, 1975). Rehabilitative progress was rejected as a variable on the theory that "social science suggests [that such progress] can neither be detected nor measured." *Id.* at 41329. Although sentence length and rehabilitation are not variable under the guidelines, they are included in a list of some 30 factors introduced in the Board of Parole regulations with the statement: "In the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate." 28 C.F.R. § 2.19 (1975).

Petitioners were not afforded an opportunity, prior to their hearings, to examine the record before the hearing examiners.

*EXHIBIT 4—Order**I. Jurisdiction to Review the Denial of Parole.*

Subject matter jurisdiction to review the denial of parole is conferred by 28 U.S.C. § 2241(c)(3) (1970), which extends the writ of habeas corpus to a person "in custody in violation of the Constitution or laws . . . of the United States." The decision to deny parole is a decision to continue the prisoner in confinement. If the Board of Parole denies parole unlawfully, the prisoner is continued in confinement as a result of that unlawful decision. Therefore, the denial decision may be tested by the writ of habeas corpus. *Zanino v. Arnold*, 531 F.2d 687, 690 (3d Cir. 1976); *Bijeol v. Benson*, 513 F.2d 965, 967 (7th Cir. 1975). By holding that the denial decision may be challenged in habeas corpus proceedings, I do not suggest that other jurisdictional predicates are not available. See *King v. United States*, 492 F.2d 1337 (7th Cir. 1974) (failure to give reasons for denial properly challenged under 28 U.S.C. § 1361 (1970)).

II. Plaintiffs' contentions other than those relating to procedural due process

The parole statutes in effect when petitioners were considered placed no restraints on the denial of parole. Instead, the pertinent statute was drawn to limit the circumstances under which parole could be granted:

"If it appears to the Board of Parole . . . that there is a reasonable probability that such prisoner [eligible for parole] will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole." 18 U.S.C. § 4203(a) (1970), *repealed*, Pub. L. No. 94-233 § 2 (March 15, 1976).

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The statute neither requires the Board to grant parole when the stated conditions are satisfied nor specifies any further factor which may permissibly affect the exercise of the Board's discretion after it has determined that the statutory conditions are satisfied.

The regulations (as distinguished from the statutes) governing parole consideration permit the Board to consider a broad range of information when making the parole decision. 28 C.F.R. § 2.19 (1975) states that "in the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate" and proceeds to specify some 30 factors. Among these 30 factors is listed: "(i) Paroling policy guidelines as set forth in § 2.20. . . ." § 2.20, in turn, embodies the guidelines, with several prefatory comments. One such prefatory comment (§ 2.20 (b)) is that the guidelines indicate the customary range of time to be served before release "for the cases with good institutional adjustment and program progress." Another (§ 2.20(c)) emphasizes that these time ranges are merely guidelines and that:

"Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release."

Petitioners appear to contend that the defendant has relied upon the guidelines to the exclusion of all other factors relevant to a decision whether to grant parole, and that this total reliance upon the guidelines offends both the Constitution of the United States and certain federal laws. However, they have not demonstrated the truth of the contention that in their cases defendant relied totally upon the guidelines. It is true that the written

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explanations of the Board's denials of parole referred explicitly and in some detail to the guidelines, but they also contained the statement that "after careful consideration of all relevant facts and information presented, it is found that a decision outside the guidelines at this consideration does not appear warranted." I can well understand that petitioners may harbor the suspicion that the use of identical language in the explanations given to each of them suggests that the Board has resorted automatically to the guidelines. Also, I appreciate the difficulty encountered by petitioners in accomplishing what they would consider an unmasking of the Board's real process of decision. But suspicion will not suffice, nor will the difficulty in meeting the burden of persuasion excuse petitioners from shouldering it.

Therefore, petitioners' contention must be considered in another light, namely, that the Board gave unduly great weight to the factors embodied in the guidelines and unduly little weight to other factors. However, as I have indicated, an extremely wide range of discretion has been vested in the Board by Congress.

Assuming, as I think I must in the absence of a showing to the contrary, that the Board considered all the factors relevant to decision in these two cases, and then decided that in these particular cases those factors embodied in the guidelines should be determinative, the record in this court does not support a conclusion that this decision in each case was arbitrary. It is true that *Garafole v. Benson*, 505 F.2d 1212 (7th Cir. 1974) appears to hold that the Board may not adopt a procedure which automatically excludes from consideration the factor of parole applicants' performance and progress in prison. But these petitioners have not shown that in the process of deciding that those factors embodied in the guidelines should be determinative in their cases, the Board failed

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to consider the 30 or so factors set forth in § 2.19, including the following:

“(f) Institutional experience:

(1) Program goals and accomplishments:

(i) Academic;

(ii) Vocational education, training or work assignments;

(iii) Therapy.

(2) General adjustment:

(i) Inter-personal relationships with staff and inmates;

(ii) Behavior, including misconduct.”

Moreover, §2.20(b) provides that the time ranges specified in the guidelines “are established specifically for the cases with good institutional adjustment and program progress.” Again, in the absence of a showing to the contrary, I must assume that the Board complied with its own regulations, and this requires me to conclude that the Board determined first that these petitioners had demonstrated “good institutional adjustment and program progress,” and then determined to apply the guidelines.

We are brought to what must be considered the essence of the petitioners’ contention: that although the Board may have proceeded within its discretion in the steps that led it to decide that the factors embodied in the guidelines should be determinative in these two particular cases, nevertheless, the guidelines are inherently arbitrary:

- (1) because they deemphasize too severely the factor of institutional adjustment and program progress;

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- (2) because they ignore the factor of the length of the term imposed by the sentencing court;
- (3) because they equate offenses carrying disparate maximum possible sentences under the statutes;
and
- (4) because they invade the sentencing authority of the courts.

(1) The decision embodied within the guidelines to deemphasize rehabilitative considerations in the parole decision cannot be characterized as "arbitrary." The preamble to the most recent promulgation of the guidelines (40 Fed. Reg. 41328) explains that these considerations were deemphasized because "social science suggests [that rehabilitation] can neither be detected nor measured." The belief that rehabilitation cannot be determined reliably is a rational basis for deemphasizing it in the guidelines. The structure for parole decision-making built around the guidelines is designed to guide decisions in the ordinary case. By refraining from considering in the ordinary case various refinements of "good institutional adjustment and program progress" (§ 2.20(b)), the Board has not precluded consideration of rehabilitation in those extraordinary cases where evidence of rehabilitation is sufficiently strong to overcome the Board's conclusion that such evidence is generally unreliable. See § 2.20(c).

(2) With respect to the factor of the length of the terms imposed by the sentencing courts, the preamble explains that the prisoner's sentence as imposed by the sentencing court was not made a factor under the guidelines because to include it would defeat one of the goals of parole policy, to reduce the effects of sentencing disparity. It cannot be said that reduction of the impact of sentencing disparity is an impermissible aim of parole

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policy, for Congress enacted the then 18 U.S.C. § 4208 (a) (2) partly to enable the Board to pursue that policy. *Garafola v. Benson*, *supra*, at 1217. Therefore, the decision to exclude sentence length from the guidelines was grounded in reason.

(3) Petitioners also challenge the guidelines as arbitrary in that the severity of various offenses carrying disparate maximum sentences is equated under the guidelines. Petitioner Benson was convicted of bank robbery. Bank robbery is placed in the "very high" severity category, and carries a long maximum sentence. Therefore, petitioner Benson cannot complain that his offense was rated in the guidelines without regard to the maximum penalty fixed by Congress for that offense. Petitioner Flowers was convicted of conspiracy. The guidelines do not indicate the severity of that offense. Petitioner Flowers has failed to show that the substantive offense to which the conspiracy was related was such that it was irrational for the Board to classify the particular conspiracy in the "very high severity" category of offenses.

(4) Noting that virtually all of the factors embodied in the guidelines are crystallized prior to incarceration, petitioners contend that the guidelines unlawfully invade the sentencing authority of the courts. However, the authority of the courts to impose a sentence is limited to authority to commit the prisoner to the "legal custody and control of the Attorney General. 18 U.S.C. § 4203(a) (1970); see *id.* § 4082(a). Section 4203(a) confers upon the Board the authority to determine, within the limits of §§ 4202, 4208(a) (1), or § 4208(a) (2), whether the period for which the prisoner will be in the custody of the Attorney General will be spent in the greater confinement of prison or the lesser confinement of supervision on parole. Since the role of the court in this statutory

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scheme is limited to fixing the maximum total period of legal custody and the minimum period of confinement in prison, the Board does not invade the function of the courts by requiring the prisoner to remain in prison longer than the minimum period fixed by the court, even though the court and the Board perform their functions on the basis of identical information. *Garcia v United States Board of Parole*, 409 F. Supp. 1230, 1239 (N.D. Ill. 1969); see, e.g., *United States v. Jackson*, 410 F. Supp. 1240, 1241 (D. Md. 1976); *Kramer v. United States*, 409 F. Supp. 1402, 1404 (N.D. Ga. 1976); *United States v. Silverman*, 406 F. Supp. 862, 867 (D.N.J. 1975).

III. *Petitioners contentions with respect to procedural due process*

A corollary of the broad discretion vested in the Board of Parole is that the court will scrutinize with particular care the process by which that discretion is exercised. When Congress confers broad power on an administrative agency without confining that power within standards, the courts should require the agency to exercise its power in a manner calculated to produce fair and substantively correct results. See *K. Davis, Administrative Law Treatise* § 2.00—6 (Supp. 1970); *K. Davis, Administrative Law of the Seventies* §§ 2.00, 2.00—6 (1976).

With respect to the questions presented by the present petitions, two aspects of procedure are significant: (1) whether the statements of reasons for the Board's actions were sufficient, and (2) whether it was essential that there be disclosed to the petitioners in advance of the hearing the record which the Board proposed to consider.

(1)

Since no congressional standards existed against which the applicant or a reviewing court could measure the facts surrounding the application, the Board must set

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forth its reasons for denial so that the justification for the decision will appear. The disclosure of reason must be sufficient to show that the denial of parole was the product of rational decision making. *United States ex rel. Richerson v. Wolff*, 525 F.2d 797, 804 (7th Cir. 1975), *cert. denied*, 19 Crim. L. Rptr. 40005 (U.S.S.Ct. April 5, 1976); *King v. United States*, 492 F.2d 1337 (7th Cir. 1974). Where the guidelines do not obviously provide a basis for decision, a statement of the reasons for denial which relies on the guidelines cannot justify the decision. Thus, where the offense severity rating is based on "offense behavior" rather than the simple fact of conviction of a certain type of crime, the statement of reasons must identify the behavior attributed to the applicant and the factual basis for the attribution. *E.g.*, *Manos v. United States Board of Parole*, 399 F. Supp. 1103, 1105 (M.D. Pa. 1975); *Billiteri v. United States Board of Parole*, 385 F. Supp. 1217, 1220 (W.D.N.Y. 1974); *Lupo v. Norton*, 371 F. Supp. 156, 163 (D. Conn. 1974).

Measured against these standards, the reasons given petitioner Benson were adequate, but those given petitioner Flowers were inadequate because they failed to disclose the offense behavior ascribed to him and the basis for the determination that his offense behavior was of "very high" severity.

(2)

I note that prior disclosure of the record upon which the parole decision is to be based has been required since May 14, 1976 by the Parole Commission and Reorganization Act, 18 U.S.C.A. § 4208(b) (Supp. Pam. June, 1976). I consider this a welcome and important change in the procedures required by statute. The question at hand, however, is whether the due process clause of the Fifth Amendment required such prior disclosure in hearings held before the statute was amended. I am aware that there is a conflict of authority on this question, and my

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own judgment is that such disclosure, while helpful to a fair and informed parole decision, is not constitutionally required.

Order

It is ordered that petitioner Flowers shall be released on the thirty-first day after the entry of this order unless, by the thirtieth day, he is afforded a further written explanation of why the Board decided that his offense behavior was of very high severity.

It is further ordered that in all other respects each of the petitions herein is denied on its merits.

Entered this 21st day of September, 1976.

BY THE COURT

James E. Doyle
District Judge.

EXHIBIT 5

**Report of the Committee on the Judiciary
United States Senate**

95th Congress)
1st Session)

SENATE
REPORT

(REPORT
(No. 95-86

OF THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

MADE BY ITS

SUBCOMMITTEE ON NATIONAL PENITENTIARIES

PURSUANT TO

S. RES. 375

94th Congress, 2d Session

APRIL 6 (legislative day, FEBRUARY 21), 1977—

Ordered to be printed

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United States Senate*

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(II)

Calendar No.

95TH CONGRESS) (REPORT
1st Session) SENATE (No. 95-86
ANNUAL REPORT OF SUBCOMMITTEE ON
NATIONAL PENITENTIARIES

APRIL 6 (legislative day, FEBRUARY 21), 1977.—
Ordered to be printed

MR. EASTLAND, from the Committee on the Judiciary,
submitted the following

REPORT

[Pursuant to S. Res. 375, 94th Cong., 2d sess.]

The Subcommittee on National Penitentiaries, of the Senate Judiciary Committee, pursuant to section 14, Senate Resolution 375, has been involved in legislation and oversight of the U.S. Bureau of Prisons, the U.S. Parole Commission, and the U.S. Probation Service during the past year.

THE PAROLE COMMISSION AND REORGANIZATION ACT

The Parole Commission and Reorganization Act, Public Law 94-233, was enacted during 1976, culminating nearly 4 years of effort by the Subcommittee on National Peni-

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tentiaries to change the basic concept of parole in the Federal criminal justice system.

The Subcommittee on National Penitentiaries was co-operatively involved with the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, and the former U.S. Board of Parole in this major effort to make parole a workable concept in a modern criminal justice system. This bill was one of the major criminal justice system bills to emerge from the 94th Congress.

The role of parole in criminal justice has changed markedly since its inception. It originated as a means for mitigating particularly harsh criminal penalties. Parole reached its zenith two decades ago, as part of a system of indeterminate sentences based upon the hope that criminal offenders could be rehabilitated and returned to society as useful citizens.

The ultimate ideology behind the unrestricted use of the indeterminate sentence was that criminal behavior was susceptible to diagnosis and treatment; that the field of corrections had the techniques and resources necessary to bring about this rehabilitation. It was also part of the belief that parole agencies could judge when the treatment had been effective.

The rehabilitation ideology has been useful to the field of corrections, because it has been used to support commitment of funds to such things as education, vocational training and industrial work for convicted offenders. However, it is not possible to "guarantee" rehabilitation as the end product of something such as a class or a counseling session, and the result has been a raising of

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public hopes that can not be fulfilled with present resources.

One role which parole has consistently served throughout its history is that of rewarding inmates for good behavior while in prison, and this was preserved in the new parole legislation. There are no scientific findings, but the professionals in the correctional field have long argued that the promise and threat of parole decisions contributes to the ability to manage inmates in penal institutions.

The criteria and guidelines required by the new legislation return parole to something much closer to its historic purposes—that of making terms of imprisonment fit public perceptions of the seriousness of the offense and the aggravating and mitigating circumstances under which it was committed. The new statute requires that the parole guidelines be published with opportunity for public comment.

The new procedures for parole have moved Federal criminal sentencing away from indeterminacy. Judges, prosecutors, victims, and offenders can now all look at the same tables of offenses, and determine the range of time to be served for the offense, under most circumstances. The new system permits the sentencing process to impose terms that are above or below the guidelines, and the Parole Commission can go outside its own guidelines, if the reasons can be documented.

The use of guidelines for parole, with the other steps taken to open up the decisionmaking process to scrutiny, make significant steps toward restoring credibility to the criminal sanction. This parole legislation is not a pan-

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—it is an attempt to solve certain problems in the administration of a sentencing system that has other major problems beyond the subcommittee's jurisdiction.

There are a number of areas in the implementation of the legislation which will require continued oversight on the part of the subcommittee.

First, the subcommittee must see that the Parole Commission continues to administer the guidelines system in a way that is consistent with the intention that indeterminacy be reduced to the extent consistent with the law.

The legislation attempted to provide inmates with knowledge of their parole status, so that the typical inmate would know the prospective time of his release, plan for this, and not make release plans when he has no hope of early release. The legislation attempts to achieve this without creating procedural requirements that would be the basis for extensive and continuous litigation. At present, prospective parole information is not being given to all of the prison population, and this would be of future concern to the Subcommittee.

Another sensitive area is the protection and release of information. The flow of information should be free enough that the public can know and understand the Commission's policies, while recognizing that some material in the files could endanger the lives of some people and invade the privacy of others. A parallel conflict exists with information taken into consideration at the time of sentencing. Revealing this information may help the offender understand why he denied parole, but it may also endanger others or go counter to the desire of the

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sentencing judge, who wishes to maintain the confidentiality of his sources.

It should be noted that provisions of the new parole law have already passed their first test of constitutionality. *Moody v. Daggett*, 20 CrL 3017.

The Judicial Conference has also noted that the implementation of new parole procedures appears to be contributing to a reduction in the Federal court caseload of prisoner petitions—a result the subcommittee predicted.

OVERCROWDING AND PRISON CONSTRUCTION

Although permanent authorization for acquisition and/or construction of new panel facilities is a part of title 18, U.S.C., questions regarding prison construction are continually being brought before the Subcommittee on National Penitentiaries.

One such question about construction for penal facilities to serve the District of Columbia was dealt with extensively by the subcommittee in 1975, when consideration was given to legislation introduced by Senator William L. Scott to authorize facilities for all District of Columbia prisoners within the boundaries of the District. No action was taken in the past year on this legislation despite the continued study of the questions that were raised regarding priorities for space utilization and neighborhood and area impact.

Neighborhood impact is one of two major and controversial issue areas aroused by each construction proposal. The other set of issues raised by construction is the population impact of new construction. This is a

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subject area with which the subcommittee will have to familiarize itself within the next year, when the Bureau of Prisons becomes subject to annual authorization, pursuant to Public Law 94-503.

Some leaders in the criminal justice field argue that construction breeds increased use of incarceration as a response to criminal behavior. Adherents to this point of view argue that the heavy investment required for construction of secure facilities precludes use of funds to evaluate alternatives to incarceration, such as restitution and halfway houses, and that when new facilities are constructed the criminal justice system will fill them. The result is a net increase in persons under state control.

Advocates of new construction argue that physical plants wear out and become outmoded as the concepts of imprisonment change, and therefore must be replaced with new facilities. Some also argue that when penal facilities are physically deficient, that those with decisionmaking responsibilities in the criminal justice system are reluctant to imprison those who otherwise would be imprisoned and therefore the deterrent and protective objectives of the criminal law are jeopardized.

At present, however, there is serious overcrowding in the Federal prison system, and it is difficult to argue that construction will create a surplus of prisoners when a surplus already exists.

The Youth Corrections Act authorizes the convening of an Advisory Corrections Council, including representatives from the executive and judicial branches, who could deal with some of the difficult questions of sentencing policy, and their effect on prison population. The Committee on Appropriations shared the view that the Ad-

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visory Council should become active in the study of these problems, and so urged the Judiciary and the Department of Justice in Senate Report 94-964 (the appropriation bill for the Departments of State, Justice and Commerce, the Judiciary and Related Agencies) to do so.

Despite congressional support for some new Federal penal facilities, it is worthwhile noting that the Federal prison population increase during the year was 3,000 prisoners—about 12 percent—and this was substantially greater than the number of new facilities occupied.

Since 1973, the Subcommittee on National Penitentiaries has been researching questions related to prison population. The efforts of the Legislative Research Service were utilized to produce in 1974 a population projection study identifying unemployment as having a high correlation with the rate of imprisonment.

Because prison overcrowding and construction questions are so closely related to the issues of sentencing and law and policy of the Federal criminal justice system, as well as the operational issues of personnel safety and institutional good order, this is an area which will have to occupy an increasing portion of the subcommittee's workload in the future.

It is likely that location and design of proposed new prison facilities would become issues in annual authorization legislation for the Department of Justice, and in annual budget resolutions. The subcommittee must expand its efforts in this area in order to fulfill its responsibilities.

The subcommittee has long held as its objective that the Federal correctional programs be models for the

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Nation. In light of the fact that State prison populations are also rising at a high rate, these questions take on even greater importance. The State prison population increase during 1976 was more than 33,000 prisoners, a number greater than the entire Federal prison population.

LEGISLATIVE OVERSIGHT

Oversight of the programs and institutions which make up the Federal correctional system is a major responsibility, and the dispersion of the system to all areas of the United States severely taxes the resources of the subcommittee.

The largest unit which the subcommittee is required to monitor is the U.S. Bureau of Prisons, which faced increasingly serious problems during the year due to the rising population of the Federal prisons, and the use and threat of violence by inmates against other inmates and institution staff.

The institutions in the Federal system which faced the greatest range of problems were the penitentiaries which house the most violent offenders, and those serving the longest sentences.

During the past year, staff was able to visit all of the penitentiaries in the Federal system except McNeil Island, Wash. A report, based on these inspection trips, was provided to subcommittee members outlining major problems.

Staffing patterns for these maximum security institutions need review because of the increasing population of more serious offenders, and because of a large number of lesser changes made in penitentiary operations over the past 5 years.

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Food, utility and medical costs of all prison institutions have risen considerably faster than the overall inflation rate, and faster than the annual appropriations for operations. Second, policy changes that have opened up mail, visitation and telephone privileges and altered disciplinary procedures (primarily due to judicial interest) have added new duties for penal employees.

Prison wardens have used such devices as delay in filling vacant positions to help meet higher food and fuel costs for the penitentiaries, and the remaining employees had new and time-consuming duties.

Control of either trend is beyond the scope of the Subcommittee on National Penitentiaries, but it is pleasing to note that a review of this problem has been partially accomplished. The Bureau of Prisons, in the budget requests of the Carter administration, has asked for additional positions to enhance the security in the penitentiaries. In addition, some staff reassignments were made late in 1976, which are helping alleviate problems at one of the institutions. This is an area over which continued oversight will be required. The level of involvement the past year in penitentiary problems precluded concerns with most of the minimum and medium security institutions in the Federal system, due to the subcommittee's limited resources, and its other activities.

Oversight activities of the Subcommittee on National Penitentiaries regarding the U.S. Parole Commission were geared largely to implementation of the Parole Commission and Reorganization Act, and are covered elsewhere in this report.

The Subcommittee on National Penitentiaries was responsible for a series of staff level meetings with repre-

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sentatives of the U.S. Probation Service concerning agency operations.

Despite the name, the supervision of probationers occupies only a portion of time of Federal probation officers. They are also responsible for preparing presentence reports and sentencing recommendations to U.S. District Court judges, for supervision of parolees and other prisoners committed to the custody of the Attorney General.

The subcommittee's work with probation grew out of the recommendation of the White House Task Force on Drug Abuse that delivery of certain aftercare service functions of the Bureau of Prisons be transferred to probation because it is the agency primarily concerned with aftercare of parolees and probationers. The functions include special counseling, chemical monitoring, and human services. Because the majority of Federal offenders have drug and/or alcohol abuse histories, availability of such services is of vital importance, but consideration must be given to criteria for utilization of these services. Questions raised by such a transfer include the question of whether such services should be voluntary in nature, and whether they should be available on the basis of need, or limited to offenders with specialized commitments. At present, the probation service has no regularized system for evaluating the needs of persons under their supervision, and some means would be a necessary part of authorizing counseling and human services.

In addition, the probation officers who make sentencing recommendations have available no current systematic information on sentences imposed for offenses committed under comparable circumstances, on the suitability and

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utilization of community supervision, or other forms of punishment, such as restitution. The Subcommittee study of the issues to be dealt with in connection with the service transfer legislation included the feasibility of means to collect such sentencing data.

Although no running tally was kept, the subcommittee has responded to more than 1,000 petitions and letters addressed to the Senate, or to individual members, by the families of prisoners, and prisoners themselves. Such correspondence raises oversight questions for the subcommittee, such as commitment and transfer policies of the Bureau of Prisons.

CRIMINAL CODE REFORM

Proposals for Federal Criminal Code reform are vital to the interests of the Subcommittee on National Penitentiaries because changes in prosecution and dispositional policies will have substantial impact on the operation of correctional programs.

Predicting such impact in specific terms is an inexact science, because changes come in the number and type of inmates; and the length of stay is a principal determinant of prisoner population. Statistical techniques have, however, been developed which permit the development of predictive models. These techniques result in a range of projections that can be relied upon as a basis for future planning and policymaking.

The subcommittee and its staff assisted the Legislative Research Service of the Library of Congress in gathering the data necessary for such a study of the proposed criminal code reform bill. S. 1. The basic data consisted

*EXHIBIT 5—Report of the Committee on the Judiciary
United States Senate*

of the presentence and other official reports prepared on persons sentenced to imprisonment during 1974.

Although changes in the basic dimensions of maximum and minimum sentences which could be imposed appeared to have little impact on prison population, according to the study, the impact of changes in the administration of sentences would be far greater. For example, if existing law providing for release as if on parole governed by institutional performance (time off for good behavior) were to be repealed, the result could be, "29.6 percent increase over the estimates of prison man-years under current law."

Obviously, other provisions of sentencing legislation could be amended to either reinforce or alter such a result. For example, a system to shorten imposed sentences could be developed as an alternative. However, there has been little legislation proposed in recent years that would result in shorter criminal sentences.

Any legislation that would affect prison population requires the subcommittee's attention because of its impact on institutional programming. If there is to be a decrease in the number of prisoners under supervision, policy questions of commitment and transfer of prisoners would be of subcommittee concern.

If the changes would mean an increase, construction of each additional prison bed costs \$10,000 plus inflation, and takes from 3 to 5 years because of the complex problems of location and design. The subcommittee has made no detailed study of operational costs since 1973, but due note is taken of estimates others have made exceeding \$10,000 per man-year.

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If new facilities are not to be constructed, but a policy of crowding existing institutions is pursued, the subcommittee must continue to concern itself with the kinds of safety-related questions studied in 1975 and 1976, such as the review of penitentiary operations discussed in the section on oversight.

Should criminal code legislation be reintroduced in the 95th Congress, the data base established this year for the study of S. 1 will be available for use of any Members of Congress seeking an analysis of the impact of sentence law changes.

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-2070
77-2100

Roderick S. Dubois,
Appellant

v.
George C. Wilkinson,
Appellee
and

Alan Gene Kincade and
Melvin E. Hentoff,
Appellants

v.
George C. Wilkinson, Appellee

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70 Street,
New York, New York 10023

That on the 14th day of November, 1977, deponent served the within Brief

upon Judith Resnik, Dennis E. Curtis, Stephen Wizner and Mary F. Keller,
Attorneys, 127 Wall Street, New Haven, Connecticut 06520

Attorney(s) for the Appellants in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 14th day of November, 197 7

Edward A. Quimby
EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1979